UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BILLY JOE WRIGHT,

Appellant,

vs.

FRED R. DICKSON, Warden,
California State Penitentiary,

Appellee.

No. 19234

APPELLEE'S PETITION FOR REHEARING

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BILLY JOE WRIGHT, Appellant, vs. FRED R. DICKSON, Warden, California State Penitentiary, Appellee.	No. 19234 PETITION FOR REHEARING

To the Honorable FREDERICK G. HAMLEY, OLIVER D. HAMLIN, and JAMES R. BROWNING, Circuit Judges, of the United States Court of Appeals for the Ninth Circuit:

Appellee, Lawrence E. Wilson, successor to Fred R. Dickson, Warden of the California State Prison at San Quentin, California, hereby petitions for a rehearing to reconsider the judgment entered in this action on September 11, 1964, on the following grounds:

I. That the issues determined in this case have never been adequately briefed and argued before this Court.

II. That any denial of right to counsel at the preliminary examination had no relationship to the constitutional validity of the conviction in the superior court.

III. That the superior court proceedings are the only pertinent proceedings, and those proceedings reflect an intelligent and voluntary waiver of counsel.

I

Since the appeal was not properly pending before this Court in the absence of a certificate of probable cause for appeal, since counsel was not appointed who could present the issues in an intelligible and serious manner, and since there was thus no oral argument of the case, respondent was not confronted with the issues raised by the opinion and the Attorney General of California had no meaningful opportunity to meet, by brief and argument, what the Court has found to be defects of a constitutional proportion in the proceedings against appellant. Since respondent believes that the opinion of the Court is based on a fundamental misconception of California criminal practice, it is imperative that the Court grant a rehearing to permit thorough briefing and argument of the fundamental issues raised by this decision.

II

At the time of the criminal proceedings against appellant, any criminal defendant in California was entitled to be represented by counsel at the preliminary examination, and if he was unable to employ counsel, the court had to assign counsel to defend him. Cal. Pen. Code § 859; 19 Cal. Ops.Atty.Gen. 104 (1952); People v. Williams, 124 Cal.App.2d 32 (1954).

Even assuming that appellant was denied his right to counsel at the preliminary examination, those proceedings were not a "critical stage" in the proceedings against him

which must as a matter of law vitiate the conviction in the superior court.

Under California law appellant could have set aside the information and voided the proceedings at preliminary examination if he was, as he claims, denied his right to counsel. People v. Williams, supra; People v. Diaz, 206 Cal.App.2d 651 (1962). Unlike White v. Maryland, 373 U.S. 59 (1963), appellant could not have pleaded guilty at the time of preliminary examination, Cal. Const. art. I, § 8, nor could any incriminating statement taken from him at that time when he was not represented by counsel have been used in evidence against him. People v. Mora, 120 Cal.App.2d 896 (1953), disapproved on another point by People v. Van Eyk, 56 Cal.2d 471, 477 (1961). Unlike Hamilton v. Alabama, 368 U.S. 52 (1951), under California law appellant could not have waived any defense, procedural or substantive, by anything that occurred at the time of the preliminary examination. Because of the nature of California criminal proceedings, it is clear that there is no federally-protected right to counsel at preliminary examination. See Odell v. Burke, 281 F.2d 782 (7th Cir. 1960), cert. denied 364 U.S. 875 (1960).

Moreover, since California law insured to the criminal accused the right to counsel at preliminary examination, and since no statements were used in this case at any time in the superior court proceedings against the appellant, the reference to Escobedo v. Illinois, 377 U.S. ____ (1964),

in the opinion of this Court was entirely unnecessary and without relevance.

Since appellant with an attorney could have set aside the proceedings at the preliminary examination and since he cannot claim any advantage from having refused the services of an attorney, the only significant question before the Court is whether he did competently waive counsel in the superior court.

III

Since 1872, California has required that a defendant in the superior court on appearing for arraignment without counsel must be informed of his right to counsel and asked if he desires the aid of counsel. "If he desires and is unable to employ counsel, the court must assign counsel to defend him." Cal. Pen. Code § 987. The record in the superior court (June 16, 1954) shows that the court did inform appellant of his right to counsel and that he waived the right. Moreover, the transcript of the arraignment for sentencing on June 28 relates that when appellant was informed of his right to counsel he informed the court that he did not want an attorney and wished to proceed without one. No dissent or disclaimer by appellant to this statement is reflected in the transcript. The opinion of this Court states that the appellant does not challenge these factual recitals.

Essentially, the opinion of this Court sets aside the undisputed record showing a waiver of counsel on the basis

of appellant's claim that "because of illiteracy, youth, and inexperience he had no understanding of his rights or of the meaning and consequences of a waiver of counsel." None of the cases cited by the Court or known to us require a hearing in the United States District Court where the record shows a waiver of counsel, simply on a claim of illiteracy, youth, inexperience, and lack of understanding. These cases relied upon by this Court involved either petitioner's uncontradicted denial of a waiver, Rice v. Olsen, 324 U.S. 786 (1945); positive evidence of record supporting petitioner's claim that any waiver was coerced, Moore v. Michigan, 355 U.S. 155 (1957); Herman v. Claudy, 350 U.S. 116 (1956); or factual allegations which by their very nature were not reflected in the record, Sanders v. United States, 373 U.S. 1 (1963). The petition here raises none of these grounds.

CONCLUSION

It is respectfully submitted that the petition for rehearing be granted.

Dated: October 9, 1964

Respectfully submitted,

THOMAS C. LYNCH, Attorney General
of the State of California
ALBERT W. HARRIS, JR.
Deputy Attorney General

MICHAEL R. MARRON
Deputy Attorney General

Attorneys for Appellee.

CERTIFICATE OF COUNSEL

I hereby certify that I am of counsel for appellee and respondent in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated: San Francisco, California

October 9, 1964

MICHAEL R. MARRON, Deputy Attorney General of the State of California

Of Counsel for Appellee and Respondent.